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Panel Brick Manufacturing, Inc. v. Charles Edward Parm and Kentucky Workmen's Compensation Board

Appellee's Brief 1976-SC-0187

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APPELLEE'S BRIEF

SUPREME COURT OF KENTUCKY

FILE NO. 76-187

PANEL BRICK MANUFACTURING, INC.

APPELLANT

VS.

CHARLES EDWARD PARM and
WORKMEN'S COMPENSATION BOARD

APPELLEES

APPEAL FROM DAVIESS CIRCUIT COURT
ROBERT M. SHORT, JUDGE

BRIEF FOR APPELLEE,
CHARLES EDWARD PARM

FILED

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Owensboro, Kentucky

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CHARLES EDWARD PARM

This is to certify that a copy of the foregoing brief for appellee, Charles Edward Parm, was served on Hon. Stephen D. Gray, of Dorsey, Sullivan, King & Gray, Ohio Valley Bank Building, Henderson, Kentucky, attorney for appellant; on Mr. William L. Huffman, Director, Workmen's Compensation Board, Frankfort, Kentucky; and on Hon. Robert M. Short, Trial Judge, Daviess Circuit Court, Division II, Daviess County Courthouse, Owensboro, Kentucky, pursuant to RAP 1.250.



Of Counsel For Appellee,
Charles Edward Parm

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BRIEF FOR APPELLEE,
CHARLES EDWARD PARM

MAY IT PLEASE THE COURT:

COUNTERSTATEMENT OF THE CASE

The initial hearing in this workmen's compensation case was held on July 31, 1974. At that time, all elements of the case were stipulated except the degree of permanent partial disability of appellee, Charles Edward Parm (hereinafter referred to as Mr. Parm), and his wages while employed by appellant, Panel Brick Manufacturing, Inc. (hereinafter referred to as Panel Brick).

Mr. Parm testified that at the time of his injury on May 17, 1974, he was 40 years old, had a tenth grade education with no particular special training for employment (T.E. p. 3). He began working for Panel Brick on February 4, 1972, as a saw operator (T.E. p. 5). He worked on a large table saw which took two men to operate (T.E. p. 14). He was paid at the rate of \$2.30 per hour (T.E. p. 6). The injury to his right hand resulted in the partial amputation of two fingers (T.E. p. 8). He described his condition as follows:

"Q59 What is the status of your hand now in your own words?

A I can't put my hand in my pocket is one thing that hurts me, and the nerves and things at the end of them throb all time. I take pain pills and things all time. Like if I touch it right down there.

Q60 You can't touch anything with those fingers?

A No.

Q61 Can you do anything with your right hand?

A No, I can't, because I can't grip it. I can't even hardly pick up a spoon or a fork with them. If I do I drop it all over the table.

Q62 What kind of sensation is it - in your own words what hurts?

A It is when I try to pick anything up - even a glass, it just slips out of my hand. I don't have no grip or nothing in it. I went to get me a drink of water this morning and I said, 'well, I am going to try this hand here,' and right on the floor it went - splattered. I just can't hold it and I don't have any grip in it. It stays sore all time." (T.E. p. 10).

Mr. Parm testified again by deposition on March 28, 1975.

He testified that after the initial hearing he was required to return to the hospital for additional surgery. He was off from work for an additional 13 weeks, and after he returned to his job, he was fired shortly thereafter because he was unable to perform his work (Parm dep. p. 3). He has three dependents and worked an average of 45 hours per week while employed by Panel Brick (Parm dep. p. 7).

After his job with Panel Brick was terminated, Mr. Parm worked for a short while for a cleaning company. He was paid \$250.00 per month (Parm dep. p. 13). He is now employed as a stockman for a drug store (Parm dep. p. 7). He earns \$2.25 per hour. He was off from work from the date of the accident until the middle of October (Parm dep. p. 14). He can only perform light work (Parm dep. p. 8). At the time this deposition was taken, Mr. Parm stated that his fingers remained swollen (Parm dep. p. 8). He has no strength in the injured hand (Parm dep. p. 9). His fingers

are quite sensitive and painful on touch (Parm dep. p. 9). He has no ability to grip and is constantly dropping objects (Parm dep. p. 9).

Dr. William A. McManus, the general surgeon who treated Mr. Parm, testified on November 12, 1974. He first saw Mr. Parm in the emergency room of a local hospital on May 17, 1974 (McManus dep. p. 3). Mr. Parm had sustained a traumatic amputation of the right third and fourth fingers at the distal joint (McManus dep. p. 4). Mr. Parm remained under the care of Dr. McManus for five months, which was an unusually extended period of time for this particular injury (McManus dep. p. 4). Additional treatment was needed because the stumps, after healing, ". . . were very tender and it became apparent that the fingers were handicapped." (McManus dep. p. 5). Mr. Parm underwent surgery for a second time on August 28, 1974. The fingers were shortened to the mid-portion of the middle phalanx of each finger (McManus dep. p. 5). Mr. Parm remained totally disabled until October 17, 1974 (McManus dep. p. 6). The doctor gave a functional disability rating of 13% to the body as a whole (McManus dep. p. 10).

All of the evidence referred to above was introduced by Mr. Parm. Panel Brick failed to introduce any evidence whatever. Therefore, the disability rating of Dr. McManus and the testimony of Mr. Parm regarding his inability to perform his usual work at Panel Brick and being discharged for that reason stands uncontradicted.

ARGUMENT

The Opinion Of The Board Is
Supported By Competent Evidence.

We submit that the Court can and should summarily affirm the decision of the Board and Daviess Circuit Court by simply referring to the case of C. E. Pennington Company, Inc. v. Winburn, Ky., ____ S.W.2d ____, decided by the Court on January 9, 1976.

The Pennington case fits this case like a glove and clearly establishes that the Board is not required to limit a recovery to the scheduled benefits section of the Workmen's Compensation Act if an employee's injury affects his ability to labor or limit his occupational opportunities to obtain the type of work he is customarily able to perform as provided for in KRS 342.730 (1)(c)(27). In the case at bar, the uncontradicted evidence clearly establishes that Mr. Parm's injuries have affected and limited his occupational opportunities; therefore, the award of the Board is certainly supported by competent evidence.

As we have previously indicated, the evidence introduced by Mr. Parm stands unopposed. Panel Brick had Mr. Parm examined by an orthopedic surgeon of its own choice, Dr. Tom Evans of Evansville, Indiana, but chose not to take the deposition of Dr. Evans. In Louisville Taxicab & Transfer Co. v. Langley, Ky., 265 S.W.2d 931, the Court held that it could be fairly assumed that doctors who treated the plaintiff but were not called as witnesses on her behalf would not have strengthened her case. Similarly, we submit that the Board could assume in this case as can this Court that Dr. Evans would not have refuted the claims of Mr. Parm that he is still having an extreme amount of difficulty with his hand including pain, extreme tenderness and a general loss of ability to lift and handle objects with his hand.

Panel Brick would have the Court believe that, according to Dr. McManus, Mr. Parm has made a complete recovery. This is simply not the case. To begin with, we seriously doubt that Dr. McManus would have given a 13% functional disability rating to the body as a whole if Mr. Parm had made a complete recovery and was able to use his hand in the same manner as before the traumatic and surgical amputations. Following the initial surgery on May 17, 1974, Mr. Parm's fingers remained very tender according to Dr. McManus, and it became necessary for plaintiff to again undergo

surgery on August 28, 1974. A fair interpretation of Dr. McManus' testimony would be to state that Mr. Parm improved following the second surgery but did not make a complete recovery as Panel Brick would have this Court believe. When cross-examined by the attorney for Panel Brick, Dr. McManus stated that he could not say that Mr. Parm could use his fingers without any tenderness. He did state that, following the second surgery, he did not believe Mr. Parm was suffering from "the tremendous pain" that he suffered prior to the second surgery (McManus dep. p. 8). (Emphasis Supplied).

On pages 12 and 13 of its brief, Panel Brick argues that, since Mr. Parm's current hourly wage approaches his hourly wage at the time of his injury while employed by Panel Brick, there has been no showing that his injuries have limited his occupational opportunities. This argument is totally without merit. To begin with, Mr. Parm's average weekly wage is substantially lower at the present time. It is uncontradicted that, while employed by Panel Brick, Mr. Parm worked 45 hours per week and was paid time and a half for overtime.

Secondly, the fact that Mr. Parm has found work at a drug store earning \$2.25 per hour does not of itself establish that Mr. Parm's injuries have not affected his ability to labor or limit his occupational opportunities to obtain the type of work he was customarily able to do. It is uncontradicted that Mr. Parm can no longer perform the type of work he was performing for Panel Brick. His testimony that he was fired from his job because he was unable to perform all aspects of it has not been denied by Panel Brick. By its failure to introduce any evidence to the contrary, Panel Brick has impliedly admitted that Mr. Parm was discharged because he was unable to perform the type of work he customarily performed. Also, Mr. Parm's own testimony regarding his inability to grip and handle objects also stands uncontradicted.

As we stated at the beginning of our argument, this Court's decision in C. E. Pennington Company, Inc. v. Winburn, supra, should govern the Court's decision in the case at bar. In the Pennington case, the plaintiff lost vision in his left eye. He was awarded a 20% permanent partial disability rating. In both cases, the respective employees returned to work for their employers for a short period of time, and in both cases they were discharged, apparently because they were not performing their work to the satisfaction of their employers on account of their injuries. In the Pennington case, the Court held that there was ample evidence to support the Board's award which was based upon a disability to the body as a whole. Likewise, we submit that there is ample evidence in the case at bar to support the Board's decision to award benefits in this case on the basis of a disability to the body as a whole as opposed to application of the scheduled benefits.

In its decision, the Board made a factual determination on the basis of the evidence in the record that Mr. Parm had sustained a loss of ability to obtain the type of work he was customarily able to perform on account of his injury and that he had suffered an injury of appreciable proportions resulting in a probable future decrease of wage earning capacity as compared to his pre-injury potential. The Circuit Court concluded that there was sufficient evidence to sustain the Board's findings in this regard and concluded that it would not substitute its judgment for that of the Board since it could not be said that the award was clearly erroneous. In so concluding, the Circuit Court was simply reiterating what has long been the law of the state, i.e., an Appellate Court will not substitute its evaluation of the weight and credibility of the evidence for that of the Board, and the factual findings of the Board are conclusive and binding on appeal when based upon competent evidence. Smyzer v. B. F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, and Armco Steel Corporation v. Mullins, Ky., 501 S.W.2d 261.

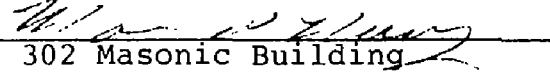
We submit that there was ample evidence in the case at bar to support the Board's conclusion that Mr. Parm's injuries had a definite effect on Mr. Parm's ability to labor and limited his occupational opportunities to obtain the type of work he was customarily able to perform. For these reasons, we submit that the opinion and award of the Workmen's Compensation Board should be affirmed.

CONCLUSION

For the reasons herein set forth, we respectfully submit that there was more than sufficient evidence to support the decision of the Board to award benefits on the basis of a disability to the body as a whole and, for that reason, the decision of the Board should be affirmed.

Respectfully submitted,

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